SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 65

HARRY LAIKIND,

Appellant,

against

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

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HARRY LAIKIND,

Appellant,

against

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of this Court's revised Rules, appellee moves: to dismiss the appeal taken from the order of the Court of Appeals of the State of New York which reversed an order of the Appellate Division of the Supreme Court of the State of New York and remanded the matter for further hearings in the Surrogate's Court of Kings County in conformity with the opinion of the Court of Appeals; or in the alternative, to affirm said order. We so move on the ground that, at this stage of this proceeding, the question sought to be presented is so insubstantial as not to merit or require further argument.

Question Presented

The terms of the New York statute (Surrogate's Court Procedure Act, § 2218, formerly Surrogate's Court Act, § 269-a), attacked as unconstitutional, are valid and have

survived several prior attacks in this court. *Matter of Braier*, 305 N. Y. 148, 691 (1953), app. dism., *sub nom. Kalmane* v. *Green*, 346 U. S. 802 (1953); *Matter of Marek*, 11 N. Y. 2d 740 (1962), app. dism. *sub nom. Ioannou* v. *New York*, 371 U. S. 30 (1962); rehearing denied, 391 U. S. 604 (1968).

The only question presented by this record is whether the Court of Appeals on the meager record before it in this proceeding correctly rejected appellant's contention that the Surrogate's Court could not constitutionally apply the provisions of the statute.

Statement

(1)

Pursuant to a decree of the Surrogate's Court, Kings County, dated October 19, 1961, the sum of $7,397.03 was deposited with the Treasurer of the City of New York to the credit of a distributee, Dvaireh Kaminsky, a subject of the Soviet Union, residing in Minsk, Russia in accordance with the Surrogate's Court Act, § 269-a (now § 2218 of the Surrogate's Court Procedure Act).

Appellant had been the administrator of the estate from which the deposit was directed. He is also a brother of the distributee whose distributive share was the only share so ordered to be deposited.

(2)

On March 18, 1964, appellant, in his personal capacity, recovered a default judgment against his sister in the sum of $7,308 in an action instituted in the Supreme Court, Kings County.

Although the judgment was entered upon a statement that the summons and complaint had been personally served, an asterisk at the foot of the judgment corrected

the statement for the 1964 judgment to recite the following:

> "Amended August 1, 1966 as of May 18, 1966 so as to recite that the summons in this action was served by publication * * *."

Prior to the recovery of the judgment, petitioner had allegedly received a letter in which the distributee, his sister, acknowledged in October, 1963 that she owed the petitioner $3,600 and that she had promised to "repay this money to you with interest".

As of March 17, 1965, the Director of Finance of the City of New York (formerly City Treasurer) certified that he held to the credit of Dvaireh Kaminsky, a resident of Russia, the sum of $7,283.32, subject to the order of the Court.

The funds on deposit with the Director of Finance had been attached by the Sheriff of New York County pursuant to an order made January 7, 1964 by the Supreme Court, Kings County, prior to the date of the judgment. The Director of Finance refused to honor the Sheriff's levy unless an order were made by the Surrogate's Court by which the funds had been deposited authorizing and directing him to turn them over.

(3)

Appellant made a motion for the release of the funds in the Supreme Court, Kings County, which motion was denied with leave to him to make application to the Surrogate of Kings County for the same relief.

(4)

Thereupon, appellant petitioned the Surrogate's Court of Kings County for an order directing the Director of Finance of the City of New York to pay over to the Sheriff of the County of New York the sum of $7,308 plus interest

accrued upon his judgment to satisfy said judgment out of the funds held to the credit of Dvaireh Kaminsky.

An order to show cause was issued on the petition on the 18th day of April, 1966 directed to, among others, the Attorney General of the State of New York to show cause why such sum should not be paid.

The Surrogate, without a trial, denied the application, in effect, finding that the judgment obtained by appellant in the Supreme Court was a scheme evolved to circumvent Surrogate's Court Act § 269-a. (50 Misc. 2d 1096.) The Court never reached any other question.

(5)

Appellant appealed this decision to the Appellate Division of the Supreme Court of the State of New York which, by order entered July 10, 1967, reversed the decree of the Surrogate, but, in accordance with its opinion (28 App. Div. 2d 884), afforded the Attorney General of the State of New York the opportunity to enter an appearance in the Supreme Court of the State of New York for the purpose of making a direct attack on the judgment obtained therein.

(6)

Appellant then appealed to the New York Court of Appeals and challenged for the first time the constitutionality of the statute under the then recent decisions of this Court in *Zschernig* v. *Miller*, 389 U. S. 429 (Jan. 1968) and *Goldstein* v. *Cox*, 389 U. S. 581 (Jan. 1968). The Attorney General of the State of New York cross-appealed.

The Court of Appeals of the State of New York reviewed the history of the statute and decisions and, analyzing the effect of the *Zschernig* decision, determined that the statute was not unconstitutional on its face, but might be unconstitutionally applied. Guidelines were set forth for the constitutional application of the State statute and, in view

of the fact that no hearing had been held in the Surrogate's Court on the basis of which a determination could be made as to whether or not the statute had been misapplied, the matter was remanded to the Surrogate's Court for further hearings in conformity with its opinion. (22 N. Y. 2d 346.)

(7)

Instead of obeying the mandate of the Court of Appeals, an appeal was taken to this Court pursuant to the provisions of Title 28 U.S.C. § 1257(2). Furthermore, while such appeal was pending, a motion for reargument was made by appellant in the Court of Appeals on the ground of supervening events. Reargument was denied without opinion. (22 N. Y. 2d 973.).

ARGUMENT

This appeal should be dismissed since it presents no substantial federal question and is premature.

Title 28 U.S.C. § 1257(2) provides for the review of final judgments or decrees rendered by the highest court of the State. The remand of this case to the Surrogate's Court of the County of Kings, due to the meager record below, can hardly be interpreted as a final determination on the merits by the highest court of the State of New York. In *Gorun* v. *Fall*, 287 F. Supp. 725 (1968), the United States District Court for the District of Montana, Helena Division, recognized that:

> "It seems clear from *Zschernig* that reciprocity statutes are not unconstitutional per se and that if a state reciprocity statute requires that the state courts do no more than read the law of a foreign nation to determine whether reciprocity exists; then the law does not infringe upon the prerogatives of the federal government. If, on the other hand, state courts find it necessary to engage in the kind of analysis exemplified

> by *State Land Board* v. *Pekarek*, 234 Or. 74, 378 P. 2d 734, and *in re Estate of Gogabashvele*, 195 Cal. App. 2d 503, 16 Cal. Rptr. 77, to apply a state statute, then the law as applied is unconstitutional." (p. 728)

This determination was affirmed by this Court in a *Per Curiam* opinion. *Gorun* v. *Fall*, —— U. S. ——, 21 L. Ed. 2d 628, 37 U. S. Law Week 3261 (decided January 20, 1969).

Although the New York statute does not involve reciprocity, the statements of the District Court in *Gorun* denying the motion for summary judgment, which was affirmed by this Court, are quite apposite to the within proceedings.

The Court of Appeals of the State of New York recognized the distinction between a statute which is unconstitutional on its face and one which could be applied in such a manner as not to improperly intrude upon the rights reserved to the federal government. The Court of Appeals saw, as did the Court in *Gorun*, that the statute could be applied in a manner consonant with the Constitution of the United States. Judge Breitel (*Matter of Leikind*, 22 N. Y. 2d 346, 351, 352) stated in the majority opinion:

> "Moreover, the majority opinion in the *Zschernig* case, in accepting the constitutionality of 'reciprocity,' arguably accepted 'benefit, use or control' provisions as valid, provided State courts did no more than 'routinely read' foreign laws and provided there was no palpable interference with foreign relations in the application. Thus, if the courts of this State, in applying the 'benefit or use or control' requirements, simply determine, without animadversions, whether or not a foreign country, by statute or otherwise prevents its residents from actually sharing in the estates of New York decedents, the statute would not be unconstitutional under the explicit rationale of the *Zschernig* case. Indeed, petitioner has made no showing that the

lower courts in this case have currently engaged in the conduct criticized, and additionally illustrated in the footnotes of the *Zschernig* case, as interference with foreign relations. Consequently, there is no present warrant to reconsider the earlier rulings of this court sustaining the constitutionality of the statutes which preceded the present one (*Matter of Marek*, 11 N. Y 2d 740, app. dsmd. *sub nom. Ioannou* v. *New York*, 371 U. S. 30 [for want of a substantial Federal question]; *Matter of Braier*, 305 N. Y. 148, 156, app. dsmd. *sub nom. Kalmane* v. *Green*, 346 U. S. 802."

There is no reason to suppose that in the light of this decision, the intervention of a federal court will be either necessary or appropriate to secure any constitutional rights of appellant.

The door to the Surrogate's Court, County of Kings, is open to the presentation of any claims for the payment of any estate shares to which the claimant may be entitled, *Ioannou* v. *New York*, 391 U. S. 604 (1968). As a matter of fact, since the decision in *Leikind*, distributive shares, previously deposited for the benefit of alien distributees, have been allowed to be withdrawn from the depository in many cases, on a proper showing that the law of the foreign jurisdiction wherein these aliens resided permitted them to inherit and enjoy the benefits of these sums.

We need not now speculate as to whether, if appellant had returned to the Surrogate's Court of Kings County and furnished proof of this fact, among others, to the Surrogate, he would not have obtained the release of the funds sought herein. Indeed, see appellant's amendment to his jurisdictional statement.

Nor is there any merit to appellant's contention that an amendment to the New York statute, effective June 22, 1968, adopting federal regulations as a bar to the transmittal of funds, is effective against him since the amend-

ment to 31 C.F.R. § 211.2, on June 28, 1968, removed the Soviet Union from the list of restricted areas to which funds of the United States may not be transmitted and, consequently, the amendment would have no application.

CONCLUSION

The order of the Court of Appeals of the State of New York should be affirmed, or this appeal should be dismissed.

Dated: New York, New York, April 11, 1969.

Respectfully submitted,

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